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TOR PENG SIE

v.

GPX LAND SDN BHD

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HIGH COURT MALAYA, SHAH ALAM
NORAINI ABDUL RAHMAN JC
[CIVIL SUIT NO: MT1-22-1699-2008]
15 JUNE 2009

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CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside - Delay of 4 1/2 months in filing application to set aside - No good reasons given for delay - Whether default judgment ought to be set aside*

The plaintiff's first suit against the defendant company was dismissed by the SAR on application by the defendant under O. 18
D r. 19 of the Rules of the High Court 1980. The plaintiff thereafter filed a second suit against the defendant. On the defendant's failure to enter appearance to this second suit, the plaintiff obtained judgment in default ('JID'). The sealed copy of the judgment and a statutory notice under s. 218 of the Companies Act 1965 was served
E upon the defendant. Some 4 1/2 months after service of the sealed judgment and notice, the defendant applied to set aside the JID. This application was dismissed by the Senior Assistant Registrar ('SAR') and the defendant thus appealed to the judge-in-chambers. The parties agreed that the only issue for the judge's determination
F was whether the SAR's order dismissing the defendant's application to set aside the JID, ought to be set aside. The defendant's director submitted that the reason why it had not entered an appearance was because its company secretary had mistakenly thought the relevant court papers served were connected to the first suit and had overlooked forwarding the papers to the defendant.

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Held (dismissing the appeal with costs):

(1) Although the defendant had submitted its reasons why it did not take steps to enter an appearance, they were not good reasons because the delay was for 4 1/2 months. The
H defendant's company secretary should have deposed an affidavit as to why she had not passed on the relevant cause papers to the defendant. This was a fundamental and fatal flaw rendering the defendant's allegations mere hearsay. (paras 22, 23, 29 & 30)

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(2) It was the duty of the company secretary to immediately pass relevant documents to the defendant, especially court documents. (para 31)

Case(s) referred to:
Ali Tan Sri Abdul Kadir & Ors v. Simpang Empat Plantation Sdn Bhd [2008] 5 CLJ 305 FC ***(refd)***
Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 1 LNS 153 FC ***(refd)***
Ng Seng Hwa v. CI Holdings Bhd [1993] 1 LNS 109 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 18 r. 19, O. 42 r. 13

For the plaintiff - Fauziah Mustafa; M/s Arun & Co
For the respondent - Arun; M/s Arun & Co

Reported by Andrew Christopher Simon

JUDGMENT

Noraini Abdul Rahman JC:

[1] Plaintiff is an individual practicing under the name and style Pacific Landmark Real Estate Agent. The defendant is a company incorporated in Malaysia. Plaintiff sued the defendant for a 2% commission for finding a piece of land by the plaintiff for the defendant to purchase. The defendant purchased the land and paid a portion of the purchase price to the seller of the land. The plaintiff's claim is for the 2% commission. Defendant denied owing the plaintiff the 2% commission.

[2] The plaintiff commenced a first suit Civil Suit No. MT1-22-2053-2007 against the defendant. An application to strike the said first suit pursuant to O. 18 r. 19 was filed by the defendant. The said application was heard by the SAR on 19 June 2008. The SAR ordered that:

(a) statement of claim be struck out with costs;

(b) the plaintiff's action against the defendant be dismissed and that the defendant be at liberty to enter judgment for their costs including the costs of application to be taxed and paid by plaintiff to the defendant. The said Order was extracted and

A served on the plaintiff as well as their former solicitors acting in the case. No appeal was filed by the plaintiff against the said Order of the SAR up to date.

[3] Subsequently, the plaintiff appointed a new solicitor and filed in this current suit. The writ of summons was served to the B defendant's registered address. In the absence of the appearance filed by the defendant, judgment in default was entered against the defendant on 2 December 2008. The sealed copy of the said judgment in default was served on the defendant's registered address together with the statutory notice under s. 218 Companies Act C 1965.

[4] Subsequently, plaintiff presented a winding up petition in Mahkamah Tinggi Sivil 3 - MT3-28-17-2009 which was to be heard today (8 May 2009) but was postponed.

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[5] After 4 1/2 months of service of the judgment and s. 218 notice to the defendant at it's registered address, defendant filed encl. 7 which is the application to set aside the said judgment in default dated 2 December 2008 and also seek a further order that the suit be struck out on grounds of *res judicata*. Enclosure 7 was E heard by the SAR wherein she reserved her judgment and the judgment was subsequently read by another SAR on 6 May 2009 ordering encl. 7 be dismissed with costs.

[6] Immediately on 6 May 2009, defendant dissatisfied with the F decision of the SAR, filed a notice of appeal to the judge-in chambers (encl. 11).

Chronology

[7] *1st Suit – MT1-22-2053-2007*

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4 December 2007	First civil suit filed by plaintiff MT1-22-2053-2007.
19 June 2008	SAR gave judgment.
	No appeal.

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2nd Suit – MT1-22-1699-2008

[8] For purposes of clarity, the order of the SAR on 2 December 2008 is set out in full as follows:

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Dalam Mahkamah Tinggi Malaya Di Shah Alam
Dalam Negeri Selangor Darul Ehsan, Malaysia
Guaman No: MT1-22-1699-2008

Tor Peng Sie
(yang beramal dalam nama dan gaya
Pacific Landmark Real
Estate Agents) ... Plaintiff

And

GPX Land Sdn Bhd
(No. Syarikat: 627590-a) ... Defendant

Dalam Kamar

Penghakiman Ingkar

Tiada kehadiran telah dimasukkan oleh Defendan dalam tindakan ini. Maka Adalah Dihakimkan bahawa Defendan hendaklah membayar kepada Plaintif jumlah sebanyak RM1,077,178.90, 5% cukai perkhidmatan sebanyak RM53,858.95 bagi jumlah tersebut di atas dan faedah pada kadar 8% setahun atas jumlah sebanyak RM1,131,037.85 dari tarikh 21.11.2007 sehingga ke tarikh penyelesaian penuh dan kos tindakan sebanyak RM225.00.

Bertarikh pada 2 haribulan Disember 2008.

t.t.

Penolong Kanan Pendaftar
Mahkamah Tinggi
Shah Alam.

Penghakiman ini telah difailkan oleh Tetuan Arun & Co., peguamcara bagi pihak Plaintif yang beralamat di Tingkat 3, Wisma Yakin, Jalan Masjid India, 50100 Kuala Lumpur. (Tl: 0302929015/022).

The Appellant/Defendant's Submission Setting Aside Of Judgment In Default

[9] The appellant/defendant's counsel at first submitted on *res judicata* on 8 May 2009. However, when this case came up for continued submission, counsel indicated he now wants to submit on the issue of setting aside the judgment in default (JD) obtained by the respondent/plaintiff against the appellant/defendant ordered by the SAR on 2 December 2008. He had submitted that if the appellant were to succeed on the issue of setting aside the judgment in default then only the second prayer in encl. 11 will come into play.

[10] The facts why the appellant/defendant did not enter an appearance in this suit is set out in the affidavit in support of Aw Khoon Hwee at para. 4 of encl. 6. Aw Khoon Hwee affirmed the following:

> 4. The reasons why the Defendant did not take steps to enter an Appearance in the Suit herein (for which I apologise) are as follows:
>
> (1) The registered office of the Defendant company is at Suite 102, B09/2, Block B, 2nd Floor, Pusat Perdagangan Taman Dagang, Jalan Dagang Besar, Ampang, 68000 Selangor.
>
> (2) I came to know of the Suit herein when I received an email dated 23.3.09 (which I forwarded to my solicitors) from the Plaintiff stating that a Winding-Up Petition No. MT3-28-17-2009 had been filed against the Defendant in Shah Alam High Court and the hearing of same had been fixed for 8.5.09.
>
> A copy of the said email is annexed herewith and marked as Exhibit "AKH1" to which the Defendant would be referring for its full context and effect.
>
> (3) Upon receiving the said email, I contacted the company secretary at the Defendant's registered office set out in para 1 above and asked her about the matter and she did tell me that she received the relevant papers in connection with the Suit herein but overlooked in not sending them to me including the Writ thinking that the papers were in connection with the said earlier dismissed Action.

[11] It is to be noted that the company secretary admitted receiving the relevant papers in this suit but had overlooked because she thought that the papers were as regards the earlier Suit MT-22-2053-2007 where the appellant/defendant had got an order from the SAR to strike off plaintiff's claim and also dismissed it with costs.

Res judicata

[12] Counsel had also submitted on the fact that in prayer (b) of encl. 7 (which is in regard to this suit), he had prayed that the action be dismissed on the grounds of *res judicata* as the present action is between the same parties as the previous action which was dismissed whereby the Senior Assistant Registrar (SAR) had struck out with costs plaintiff's statement of claim under O. 18 r. 19, RHC 1980. The SAR also dismissed plaintiff's action against the defendant and that the defendant be at liberty to enter judgment against plaintiff.

[13] Based on this judgment, the appellant/defendant submitted that there is *res judicata*. He quoted the case of *Ng Seng Hwa v. CI Holdings Bhd* [1993] 1 LNS 109 HC which is similar to the present case. The principle in *Ng Seng Hwa*'s case is, if an action has been struck off under O. 18 r. 19 the remedy for the plaintiff is "to appeal against the decision ... striking out his writ of summons and statement of claim. This he failed to do. Therefore, he is barred from instituting this suit based on the same cause of action" (per Shaik Daud).

[14] Counsel submitted that since the cause of action and the parties are the same, the Order of the SAR on 19-6-2008 is in force and as such, there is *res judicata*.

The Respondent/Plaintiff's Submission

[15] Initially, counsel for respondent/plaintiff submitted that the Order of the SAR dated 19 June 2008 is defective because it does not follow the words of O. 18 r. 19 ie, in the Malay version, the SAR used the words 'Dibatal Dengan Kos' and the words "tindakan yang di difail di sini oleh plaintif terhadap defendan di buang dan defendan diberikan kebebasan untuk memasukkan penghakiman terhadap kos ...".

[16] However, after having compared the Rules of the High Court, O. 18 r. 19 in both languages, counsel conceded that the Order made was proper.

Delay

[17] From the court's record, the affidavit of service of the writ and statement of claim was served on the defendant on 12 November 2008 by personal service (See encl. 3). There is no memorandum of appearance filed by the deendant. A certificate of non appearance was filed on 2 November 2008. On 2 November 2008, the respondent/plaintiff filed and obtained judgment in default.

[18] Counsel for respondent/plaintiff submitted, there is a delay of 4 1/2 months from 2 December 2008 till 16 April 2009 when the appellant/defendant the application to set aside JID. Order 42 r. 13, RHC 1980, provides that judgment must be set aside within 30 days from the date of service of the same. He further submitted that the judgment is a regular judgment and this is admitted by the appellant/defendant in the affidavit of Aw Khoon Hwee at para. 4 of encl. 6.

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Res Judicata

[19] Counsel for the respondent/plaintiff denied that there is *res judicata* on the basis that the cause of action and issues in the first and second suit (this suit) are different.

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[20] He cited the following cases:

a) *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 1 LNS 153 FC

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b) *Ali Tan Sri Abdul Kadir & Ors v. Simpang Empat Plantation Sdn Bhd* [2008] 5 CLJ 305 FC.

The Company Secretary's "Oversight"

[21] The defendant says that their secretary was served with all cause papers but they mistook it for the 1st Suit. This cannot be true because the conduct of the secretary can be submitted as follows:

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a) the secretary accepted the writ of summons and statement of claim;

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b) the secretary accepted the plaintiff's solicitors letter enclosing the judgment and s. 218 notice etc (please see exh. TPS1 to 3 of the defendant's affidavit Tambahan).

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c) the company secretary refused to acknowledge by signing the above documents. (Why they did not do so was not prominently explained in the defendant's affidavit).

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d) if as alleged by the defendant, the company secretary mistook it with the 1st suit, the plaintiff's solicitors' letter enclosing the writ of summons and s. 218 notice prominently referred to the 2nd suit. The company secretary cannot be so naïve or silly to assume the papers served on them lawfully belongs to the 1st suit;

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e) in any event even if as alleged the company secretary overlooked it, their duty is only to forward all documents/papers served on them pertaining to the 2nd suit.

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f) it is not the duty or function of the secretary to make judgments or conclusions in whether the documents belonged to the 1st suit or otherwise.

[22] The fundamental flaw and which is fatal is that the company secretary has not filed a simple affidavit to support the allegation of the defendant. Therefore, allegation of the defendant is a mere hearsay.

[23] Hence the credibility or *bona fides* of the defendant is in serious doubt. The court is urged to nurse some doubts as to the veracity of the allegations and form the necessary inference including adverse inference under s. 114(g) of the Evidence Act.

[24] If the secretary had lodged it would enable a affidavit to support the defendant's affidavit and their allegations the plaintiff's counsel opportunity to cross examine secretary which was denied the plaintiff by the non-production of the supporting affidavit to corroborate the defendant's allegation.

[25] Why the company secretary is hiding behind unfounded allegations is only known to them.

[26] In any event none of the contentions of the plaintiff's affidavit opposing the setting aside application was denied. It is trite (as seen above) that non-denial is admission.

Court

[27] After hearing the submissions of both counsels based on their written submission and after referring/reading their affidavits, authorities and other relevant documents I have come to the following conclusions.

[28] However, before giving my reasons, I must state that at the end of the submissions, both counsels agreed that the only issue for the court to determine is whether the court can set aside the Order made by the SAR dated 2 December 2008.

[29] It is an undisputed fact that the cause papers was served properly. (See the supporting affidavit of Aw Khoon Hwee at para. 4 of encl. 6). Although the counsel for the appellant submitted that the reasons given as to why the appellant/defendant did not take steps to enter an appearance, they are not good reasons because the delay was for 4 1/2 months. The company secretary should have deposed an affidavit as to why she did not pass on the relevant cause papers and other documents to the appellant/defendant.

A **[30]** The reasons for the delay was in fact given by Aw Khoon Hwee who is one of the directors of the defendant company. Why didn't the company secretary herself, who would know the real reason for the delay, put in the evidence by way of an affidavit.

B **[31]** In any event, it is the duty of the company secretary to immediately pass the relevant documents to the appellant/defendant, no matter what the documents are, especially court documents.

[32] Based on the above reasons, I hereby dismissed the appellant/defendant's appeal with costs.

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